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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 227.

CHARLES H. TREAT, U. S. COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

STEPHEN V. WHITE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 19, 1900.

Petition for (17680.) rehearing

~~ARGUMENT~~ OF S. V. WHITE, DEFENDANT IN ERROR IN PERSON.

1 Supreme Court of the United States.

October Term, 1900. No. 227.

CHARLES H. TREAT, UNITED STATES COLLECTOR of internal revenue, *Plaintiff in error*,
vs.
STEPHEN V. WHITE,
Defendant in error.

PETITION FOR REHEARING.

2 To the Honorable Judges of the Supreme Court of the United States:

Upon examining the opinion of this court in the above entitled cause, filed April 29, 1901, it seems to the defendant in error that it is his duty, most modestly and deferentially, to present to the court a phase of this case which seems to him to have been not fully recognized in said opinion. He feels that the decision in this case overrules the law as expressly stated by Mr. Justice Hunt in the case of United States vs. Isham, 17 Wall, 504, the statement of which is in these words: "The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect." Adopting the direct speech and speaking in the
3 first person, I feel that this expression of the law by Judge Hunt is a continuance of the current of decisions as laid down by the courts in England through many years.

In my presentation of the case before this honorable court I was, I am sure, too confident in regard to the construction of the word "agreement," as to which it seemed to me, until I was corrected by the decision of this honorable court, clear, that an agreement could not be made except by the mutual assent of two minds, and I argued upon that line, because I felt so confident that, THAT would be sufficient. The opinion of this court has settled that question, and to it I yield most unreservedly. But the recognition of the words of Mr. Justice Hunt in United
4 States vs. Isham, *supra*, that "the words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect," is, it seems to me, to make a clear distinction between what a learned judge sitting in the deliberations of a consultation room of such a tribunal as this, might decide was involved in an obscure phrase, and what ordinary

men engaged in business would understand a statute to mean, and that the test is, what such understanding would be by conscientious and sensible men. The courts have constantly avoided setting traps or permitting traps to be set into which honest men in the discharge of their business may fall through error. They have said in the construction of the statutes, to the legislative body, "you must state your wording not only so a lawyer learned in the technicalities and abstruseness of the law may understand it, but you must state it in such a manner that the men who are not learned in the law, but pursuing their avocations, can arrive at a correct conclusion." If there is any doubt upon the question, the courts have said, and I will cite the instances a little later on, then the statute must be construed against the government. I am reminded of a distinction said to have been made by a distinguished chef when an assistant appealed to him as to whether an egg should be used which he had decided was good. The retort of the chef was, "If you have to study the quality of the egg, it is a doubtful egg, and a doubtful egg must never be used." The courts have, in the decisions to which I have referred, as it seems to me, said to the lawmakers, "You must make your law so that there can be no doubt about it, because doubtful constructions must be excluded."

Now, having stated this proposition of law, I apply it to the case in point, and that I may fairly and legitimately aid the court in coming to a correct conclusion as to how questions of this kind are understood "by that public in which they are to take effect," I have prepared, and file with this application, the affidavit of Brayton Ives, thirty-three years a member of the stock exchange, and president of the stock exchange for two years; of J. Edward Simmons, for eighteen years a member of the stock exchange, and two years its president; and the affidavit of Honorable Russell Sage, veteran and specialist in puts and calls and privileges of that character, in which they each say they never heard a call spoken of as an agreement to sell. Mr. Ives is president of the Metropolitan Trust Company. Mr. Simmons is president of the Fourth National Bank. Mr. Sage's reputation is coextensive with the financial world. In addition, I have given my own declaration as a busines man, and an officer of this court, showing the same condition, and upon these statements the conclusion is irresistible that no person "in that public in which this law was to take effect" would ever have applied the words "agreement to sell stocks" to the paper in controversy. So much for the technical understand-

9 ing among the members of the stock exchange, and those to whom alone this question is a matter of practical construction and application. Now, to show the inherent doubt upon the question itself, I would state that this case is a case with a history. I wrote a letter to the commissioner of internal revenue of the United States, in which I told him that I would come down here and present the arguments against taxation of puts and calls, and agree to be governed by the opinion of the attorney general as fully as though he himself were a court of competent and final jurisdiction to hear and determine the entire question in controversy, provided only I might be fully heard on the question. That offer was accepted, and I came. I went before the assistant attorney general, Colonel
10 Boyd, since appointed judge of the district court of the United States for one of the districts in the state of North Carolina. He heard my argument and decided without a minute's hesitation that neither puts nor calls were taxable. He wrote an opinion and sent it to the attorney general, to this effect, parts of which were read to me. Mr. Attorney General Griggs, then in office, differed from his opinion as to calls and gave directions that it should be decided differently, and this was done when I was not present, by a law officer before whom I had not been heard. It was conceded by the attorney general and the assistant attorney general that I was not bound by that order, and that I could therefore in honor proceed with the
11 determination of this case before the court. Here was a man learned in the law, standing free from bias, who decided that the paper is not taxable. If the assistant attorney general of the United States did so decide, can it be proper under the rules of law established and enunciated in United States vs. Isham, supra, that the men "who are doing business" should know more of the intricacies of the law than the attorney general? When suit was brought that very eminent judge, Mr. Justice Lacombe, of the circuit court of the United States for the second judicial circuit decided in my favor. I cite these cases not to wrestle with the view of this court, nor in contention with its opinion, but as bringing this case within the rule of law laid down, to wit, that *where a case is of doubtful construction the decision of the*
12 *court must be against the government*, although the court might be compelled to differ as to some abstruse question involved.

To show the soundness of the decision in United States vs. Isham, *supra*, I lay special emphasis upon the case of Commissioners vs. Angus, 23 Q. B. D. 579, where the court said:

13 "Acts of Parliament imposing stamp duties are to be construed
"according to the plain and ordinary meaning of the words used
"as it appears from the words themselves, as if a means *can be*
"*found* of carrying out a transaction without incurring liability
"to stamp duty, *the subject is justified in adopting it.*"

And the words of Pollock, C. B., 11 Exchequer Rep. 190, as follows:

"If there is any doubt as to the meaning of the words, they
"ought to be considered in favor of the subject, because a tax
"cannot be imposed *without clear and express words for that*
"*purpose.*"

14 Now, as it is affirmatively shown that no Wall Street man ever heard one of these papers spoken of as an agreement to sell, and as there is a word about which there is no ambiguity, is not this Court justified in holding that means can be found for carrying out the transaction without incurring liability to stamp duty, and should not the Court hold that where one word, to wit, "Call," is recognized by everybody as expressing the paper in controversy that the public doing business under the law should not be put upon their inquiry as to what is involved in a periphrastic sentence which a lawyer might find was broad enough to cover the paper in controversy? The clear and express word for that paper is "Call." The periphrastic sentence
15 is "agreement to sell," which expression no stock broker ever heard applied to a "Call."

As was contended in my brief, and I simply bring it up again as bearing upon the phase of the argument which I am now presenting, that doubt as to the meaning of the construction must exclude such construction, I urge again that the plain, ordinary meaning of the words necessary to include a call was the word which was known to the lawmakers, known to lexicographers, and known to business men for a period running through the entire commercial history of the country, to wit: "calls." Everybody knows what a call is. Some people do not know what an agreement is. Unfortunately, I did not. I thought there could not be an agreement unless there were two
16 who mutually assented to a proposition. In that I was in error, but everybody knows what a call is. Why then, did not the lawmakers, if they wished to impose the obligation, use the words meaning a call, in the plain and ordinary words for such a paper?

Suppose this question had arisen in a criminal proceeding, and I had been indicted for issuing an unstamped call.

17 Suppose the defense and the government had respectively asked the court to charge the jury as follows:

CHARGE ASKED FOR THE DEFENSE.

"A man is presumed to be innocent until he is proved to be guilty. Unless the jury find that the words 'agreement to sell' in the statute were construed to mean calls by intelligent and conscientious business men among 'that public in which the law took effect,' then the jury must find for the defendant, although the court charges you that the words 'agreement to sell' is a phrase sufficiently comprehensive to include calls."

18 CHARGE ASKED BY THE GOVERNMENT.

"The court charges you as a matter of law that the words agreement to sell includes calls, and if the defendant signed a 'call' without affixing a stamp thereon, you must find him guilty, although no man in '*that public in which the law took effect*' had ever heard or thought of a 'call' as an 'agreement to sell,' and although that public would have understood that the word 'call' would have described the paper to be taxed '*in a clear and determinate manner from the language of the statute*' if the word 'call' had been used."

Which one of these charges would have followed the cases U. S. vs. Isham, 17 Wallace, and Adams vs. Bancroft, 3 Sumner cited 19 supra and in my original brief.

I cannot make the proposition plainer, and I deferentially submit it with the suggestion that the proper interpretation of the law would be the same in a criminal cause as it is in this case where the money was paid into the treasury under menace of a possible indictment.

Why make the average business man who knows what a call is, resort to an interpretation of an unusual sentence when this would leave no doubt.

I do not wish to weary the court. I think that the affidavits of the very eminent men which I have filed will show that no man in the stock exchange would ever have been led to believe that this paper was included in the law under the term "agreement to sell." There was 20 no indication to us as to what was right, when the internal revenue department swooped down upon us, for they held that a put, which is an offer to buy, was an agreement to sell, and they never reversed that decision, but acted under it through a series of years, until the attorney-general at my suggestion, in the argument to which I have referred, held that a put was not taxable.

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21 Will the court pardon me for a personal explanation? Until I made the trifling indebtedness of $604 involved in this suit, by my adhesion to what I believed to be right, I never had a nickel's interest in this question. The people who paid this tax are not the people who sell the instruments. I could have gone on and paid what I believed to be a wrongful tax, and what I proved to be a wrongful tax, so far as puts were concerned, through all the years that I might be doing business under the law, and it would never have cost me a cent., but all the money would have come out of a class of men among the poorest of those who hang on the frayed and tattered edges of Wall street life. There were none of these men who could have ever brought suits;
22 they have not the money. They were as honest and upright in most instances as we who sold the papers, but the rule was adopted at once —and adhered to by everyone save myself—that the person buying the puts and calls should pay the government tax. If I believed it right I should have adopted it. I was not willing to take money from a man poorer than I was, and as honest as I was, under a construction of the law which I believed to be inherently wrong, and so I made the stand, and after the government had taken many tens of thousands of dollars for tax on puts which before this time would have run into many hundreds of thousands of dollars for the tax on them, that tax was declared illegal and abandoned. I was not willing that the poorer
23 men, who were least of all in our business circles able to stand it, should pay it, and the internal revenue department was forced to overrule their own decision and abandon the tax on puts. I still stood for what I believed to be right, and for what I hope I may yet convince the court is right as to calls. I have taken all the trouble and expense in this litigation, not with the hope of getting any compensation whatever from any person in the world.

I have been a long time in Wall street and had much to do with the internal revenue department. I withstood from the first day that the claim was made until it was finally settled by this court, in the case of Bailey vs. Luther Clark et al., 21 Wall, 284, the wrongful contention on the part of the internal
24 revenue department that a ***man's debts*** were his capital in business. Under the law as then existed, a man was taxed one twenty-fourth of one per cent. monthly on his business, or on a capital of $200,000 he was taxed $1,000 in a year. The internal revenue department contended that he should be taxed on all the money that he borrowed

25 for his business, thus making the outrageously startling declaration that a man's capital was all he owned and all that he owed!

On the pledge of stocks which have a quick market value it was then customary, and is now, for a house to borrow ten times as much money as they have capital, so that on a capital of two hundred thousand dollars ($200,000) they borrowed two million dollars ($2,000,000) and were taxed eleven thousand dollars ($11,000) as a tax on their capital, or 5½ per cent. instead of ½ per cent. on their real capital.

Suit was brought and decided in the circuit court of the United States against the contention of the government, but that did not stop collecting the tax. That preposterous and unblushing assertion, that debts were capital, was finally brought to a conclusion by this court
26 after several years of the collection of money under that claim. Of course, this court decided against the contention of the internal revenue department, but during that time my neighbors in business were despoiled of more money under this false construction of a just law than was the commerce of the world ever despoiled by all the pirates that ever sailed the Spanish main. That unjust collection amounted to many millions of dollars. I say my neighbors were, in contradistinction to myself, for I refused to pay the tax and defied the department to make a distraint, which they never did. When under the recent war tax law they came down upon us with a claim that an offer to buy stocks was an agreement to sell them, and taxed puts
27 accordingly, while the actual purchase itself would never be taxed, it was the blast from the bugle of my old enemy which roused me to contest. And I have at least saved honest men from heavy, unjust collections as to puts.

I wish to make only one comment further in answer to the suggestion of the learned justice delivering the opinion, in which he says:

> "An isolated agreement to sell stock made by an individual
> "in Austin, Texas, is an agreement to sell, subject to the stamp
> "duty imposed. It is none the less an agreement to sell when
> "made in the Stock Exchange of New York, as one of a multi-
> "tude of similar transactions."

28 I recognize most fully the correctness of this statement, but I urge the further proposition that coming under the law as laid down in the United States vs. Isham, *supra*, the people in New York and other stock exchange centers are "the public in which this law is to take effect," and their understanding, if reasonable and conscientiously made, being of course justified by a sensible and fair-minded doubt,

29 is controlling under that decision, when an isolated case in Austin, Texas, would not be. I humbly suggest in the close of this argument that I am happy in the belief that this great tribunal, the first on the continent and the peer of the best in the world, stands far above any question of pride of opinion. If, in my poor efforts to express the reasons why the inquiry of the circuit court of appeals should be answered in the negative instead of the affirmative, I have laid undue stress upon a part of the argument in which I was in error, and did not sufficiently emphasize a matter which, on the whole, should be controlling, I am sure that this court will as gladly and cheerfully announce a different decision in the matter, as they would have announced had they never given an expression differing from the
30 claim for which I contend.

All of which I most respectfully submit with expressions of my profound respect for the opinion of this court, however it may be finally rendered.

S. V. WHITE,

Defendant in error, in person.

I, S. V. White, a counsellor of this court, do state on my honor as such counsel, that the foregoing petition is not interposed for delay, and is, as I verily believe, well founded in law.

S. V. WHITE,

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Defendant in Person.

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33 United States Supreme Court.

October Term. No. 227.

CHARLES H. TREAT,
Plaintiff in error,
vs.
STEPHEN V. WHITE.

I, Brayton Ives, do make oath and say:

That I am the President of the Metropolitan Trust Company
34 doing business on Wall street, New York City; that I have been for about thirty-three years a member of the New York Stock Exchange, having been for two years Vice-President and two years President; that I have no interest in any privilege nor in the stamp thereon; I state that I am acquainted with the instruments known as "Calls" on stocks; that I never heard a "Call" designated as an agreement to sell stocks, but always heard them designated simply as "Calls."

This affidavit is made for the purpose of showing the Stock Exchange nomenclature of such instruments in Wall street circles, and not otherwise.

BRAYTON IVES.

35

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK. }

Subscribed and sworn to before me }
this third day of May, 1901. }

JAMES WALSH,
Notary Public.
Kings County,
Certf. Filed N. Y. Co.

{ SEAL. }

36

I, J. Edward Simmons, do state on oath that I am President of the Fourth National Bank of New York City; that I was a member of the New York Stock Exchange from about 1869 to 1887; that I

37 was for two years its President; that I have read the affidavit of Brayton Ives, and I state that the same is true so far as the designation of "Calls" is concerned.

Further affiant saith not.

J. EDWARD SIMMONS.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. }

Subscribed and sworn to before me
this third day of May, 1901.

38

JAMES WALSH,
Notary Public,
Kings County,
Certf. Filed N. Y. Co.

{ SEAL. }

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41 United States Supreme Court.

October Term. No. 227.

CHARLES H. TREAT,
Plaintiff in Error,
vs.
STEPHEN V. WHITE.

I, Russell Sage, do state on oath that I have been for more than twenty-four years a member of the New York Stock Exchange; that during that time I have dealt in "Calls" upon millions of shares of
42 stock; that I read the affidavits of Brayton Ives and of J. Edward Simmons, and that I agree with them in the fact that I never heard a "Call" spoken of as an agreement to sell stocks. It has its well defined name of "Call," and is often spoken of also as a buyer's privilege or option.

This affidavit is made solely for the purpose of fixing the ordinary understanding as to the nomenculture of "Calls."

RUSSELL SAGE.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK.

43 Subscribed and sworn to before me this third day of May, 1901.

JAMES WALSH,
Notary Public,
Kings County.
Certf. Filed N. Y. County.

SEAL.

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United States Supreme Court.

October Term. No. 227.

CHARLES H. TREAT,
Plaintiff in Error,
vs.
STEPHEN V. WHITE.

I, Stephen V. White, Defendant in error in the above entitled cause, do state upon my honor as a man and as an officer of this Court that for more than thirty-six years I have been constantly engaged in
46 business in the New York Stock Exchange and doing business within that time in the Stock Exchanges of Boston, Philadelphia, Chicago, and San Francisco; that in the course of such business I have dealt in "Calls" for hundreds of thousands of shares of stocks; that in that time I never heard one spoken of as an agreement to sell, but they were always designated either as Calls, or Privileges, or Options.

I make this statement as bearing upon the nomenclature by which men dealing in those papers are accustomed to designate and to hear them designated.

S. V. WHITE.

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